

# Appeal Rights and the Review Process



# Formal Decisions

- All notices of decision and compensation orders are considered formal decisions on claims for monetary compensation, and may be appealed.
- Letters or compensation orders denying review of a prior decision, or denying modification of a prior decision, may be appealed to the Employees' Compensation Appeals Board (ECAB).

# Appeal Rights

- Appeal rights include a hearing, reconsideration, and/or review by ECAB
- Applications for hearings are processed by Branch of Hearings and Review (BHR) within the Office of Workers' Compensation Program's (OWCP) National Office
- Applications for reconsideration are handled by OWCP's District Office personnel
- Review by ECAB is an entirely separate entity from OWCP within the U.S. Department of Labor

# Order and Number of Appeals

- Appeals may be requested in any order, except that a hearing may not be held after case has been reconsidered.
- There are timeliness requirements associated with filing each type of appeal.
- There is no limit to the number of times a claimant may request reconsideration and submit additional evidence.



# Hearings and Review

- The FECA (5 U.S.C. 8124(b)) states that a claimant not satisfied with a formal decision is entitled to a hearing by an BHR representative if the request is made within 30 days of the date of the decision. This provision (which applies to injuries occurring on and after July 4, 1966) includes stipulation that any such request must be made before reconsideration under 5 U.S.C. 8128(a) is undertaken.
- Apart from the hearing provided under 5 U.S.C. 8124(b), OWCP also provides the opportunity for an oral pre-recoupment hearing on the issues of fault and waiver, to anyone who is notified of an overpayment of benefits and requests a hearing within 30 days.

# Hearings and Review

## Right to a Review of the Written Record:

- In place of an oral hearing, claimant is entitled to a review of the written record (subsequently referred to as "review") by a BHR representative.
- Such review will not involve oral testimony or attendance by claimant, but claimant may submit any written evidence or argument deemed relevant.



# Limitations on a Hearing

Issues for Consideration :

Hearing or review will usually be limited to those issues which were addressed by OWCP's district office (DO) in contested decision. Other issues may be addressed at the discretion of BHR's Hearing Representative.

# Proceedings: Review of the Written Record

- BHR will furnish employing agency (EA) with a copy of claimant's request for review of written record, together with any pertinent factual documentation submitted. (Medical evidence is not considered "pertinent" for review and comment by EA, and will therefore not be furnished to EA. OWCP has sole responsibility for evaluating medical evidence.)
- EA will be allowed 20 days to submit any comments and/or documents believed relevant and material to issue in question. BHR will furnish any comments or documents submitted by EA to claimant and allow 20 days for review and comment by claimant (20 C.F.R. 10.618(b)).
- Following a review of record and any evidence submitted, BHR representative shall decide claim and inform claimant, claimant's representative, and EA of decision. Appeal rights will be attached to any adverse decision.



# Proceedings: Oral Hearing

- Nature of Proceedings - Hearings will be open to claimants, his/her representative, witnesses, designated EA officials, and any other persons whose presence BHR's Hearing Representative deems necessary.
- Proceedings are informal and are not limited by legal rules of evidence or procedures. Proceedings are limited to one hour; however, this limitation may be extended at the discretion of BHR's Hearing Representative. Testimony will be taken under oath and recorded verbatim.
- When all witnesses have spoken, and Hearing Representative has obtained all necessary clarification, Hearing Representative will close proceedings by noting time of completion. Record will remain open for submission of additional evidence for 30 days after hearing is held.
- Claimant (or authorized representative) and EA will be provided with copy of transcript. EA will be allowed 20 days from release of transcript to submit any comments and/or documents believed relevant to issue in question.
- When all evidence and testimony has been evaluated, Hearing Representative will issue a decision which affirms, reverses, remands, or modifies DO decision.

# Reconsideration

The authority for “reconsideration” is found in the FECA (5 U.S.C. 8128(a)) which provides that OWCP may review and reconsider an award for or against payment of compensation at any time on the District Director's own motion or on application from claimant, and may:

- End, decrease, or increase the compensation previously awarded; or
- Award compensation previously refused or discontinued.



# Requesting Reconsideration

- Claimant may apply for reconsideration of a final decision regardless of date of injury or death.
- No special form is required, but request must:
  - Be in writing,
  - Be signed and dated,
  - Identify the decision,
  - Identify the specific issue(s) for reconsideration, and
  - Be accompanied by relevant new evidence or argument not considered previously.

# Requesting Reconsideration

All requests for reconsideration should be accompanied by one of the following:

- Argument that OWCP Erroneously Applied or Interpreted a Point of Law. For example, CE failing to include all appropriate elements of pay when determining a pay rate for compensation purposes.
- Relevant Legal Argument not Previously Considered by OWCP. For example, in a case that was denied on the basis of a medical opinion of a referee specialist, the introduction of evidence to support a prior connection between the referee physician and the employing agency would be sufficient to require OWCP to reopen the case for a review of the merits.
- New Evidence (not previously considered by OWCP) which is Relevant to the Issue Upon Denial. For example, the submission of a witness statement would be considered relevant if claim had been denied because fact of injury or performance of duty had not been established.
- Special Evidence or Argument. For instance, submission of a completed Form CA-1032 following suspension of benefits for failure to provide that form.

# Reconsideration - Timeliness of Request

- Reconsiderations must be received within one calendar year from the date of the original decision. Right to reconsideration within one year also applies to any subsequent merit decision on issue(s), such as hearings, written reviews, and ECAB merit decisions.
- The assigned examiner may consider an untimely application for reconsideration only if application demonstrates clear evidence of error in OWCP's decision.
  - The term "clear evidence of error" is intended to represent a difficult standard. Claimant must present evidence which on its face shows that OWCP made a mistake (for example, proof that a schedule award was miscalculated).
  - However, evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error. (JC, 52 ECAB 395(2001); DB, 43 ECAB 1153 (1992); LT, 43 ECAB 227 (1991)).

# Reconsideration - Timeliness of Request

## Note on Timeliness :

- Criteria used to determine timeliness of a reconsideration request changed with regulations that were published on June 28, 2011.
- Regulations now provide that an application for reconsideration must be **received** by OWCP within one year of the date of OWCP's decision for which review is sought. This guideline for timeliness was **effective August 29, 2011**. Therefore, a reconsideration request **pertaining to a decision issued on and after August 29, 2011** will be evaluated using this rule.
- **For any decision issued prior to August 29, 2011**, the prior regulatory guidelines prevail. These parameters required that OWCP use: 1) postmark date on the envelope, if that was retained; 2) date shown on the reconsideration request; or 3) date of receipt. These are listed in order of priority so that only time date of receipt was appropriate is if neither of other two dates were documented.

# Proceedings: Reconsideration

- If the application is timely, the assigned examiner must then determine whether a merit review is appropriate.
- If no new evidence or legal argument is presented with request, then request for review will be denied. If, for example, claimant submits Appeal Request Form with no evidence, application is clearly insufficient to warrant a merit review. Claimant's only appeal from this decision is to ECAB.

# Proceedings: Reconsideration

- When request for reconsideration is accompanied by new evidence, the assigned examiner must determine whether it is sufficient to review case on its merits. This step requires a review of file to assess what material it already contains. The following types of new evidence are not sufficient to reopen claim for merit review:
  - Cumulative evidence, which is substantially similar to material on file which has already been considered.
  - Repetitious evidence, which consists of copies of documents previously submitted or a restatement of previously considered evidence.
  - Irrelevant/immaterial evidence, which has no bearing on issue or which is frivolous or inconsequential in regard to issue.
- If evidence submitted is not sufficient to require a merit review, the assigned examiner will prepare a decision explaining reconsideration request is denied because evidence submitted did not warrant review. Claimant's only appeal from this decision is to ECAB.



# Proceedings: Reconsideration

- When reconsideration request includes new, relevant evidence, legal contentions not previously considered or identifies a significant factual or legal error, the assigned examiner will conduct a “Merit Review” of case to determine whether prior decision should be modified.
- As soon as the assigned examiner decides that an application is sufficient to warrant a merit review of case, EA should be notified; however, requirement to provide a copy of application and evidence received differs depending on whether issue for determination is medical in nature.
  - If there is a legal argument or a factual basis for merit review, application along with copies of pertinent supporting documentation should be sent to EA.
  - Where a reconsideration request pertains only to a medical issue (such as disability or a schedule award), EA should be notified that a request for reconsideration has been received, but no comments should be solicited from EA if medical evidence is sole basis for review.

# Proceedings: Reconsideration

- If EA is provided with application, comments should be submitted within 20 days.
- Any evidence submitted by EA will be forwarded to claimant with a letter allowing 20 days for comment before a final decision is issued on reconsideration request.



# Reconsideration: Merit Review Decisions

- The assigned examiner can issue a variety of decisions based on his/her review of file and additional evidence upon reconsideration:
  - MODIFY – The assigned examiner will prepare a new formal decision to modify any previous decision.
  - VACATE - If a previous decision is to be overturned and a benefit or compensation approved, the assigned examiner will prepare a vacate order and a cover letter which explains acceptance.
  - DENY MODIFICATION (AFFIRM) – The assigned examiner will prepare a formal decision to deny modification of prior decision. This denial does not carry right to a hearing, but does carry right to request reconsideration again or review by ECAB.

# Employees' Compensation Appeals Board

- ECAB is an independent Department of Labor agency which considers and decides appeals of formal decisions in FECA cases. ECAB consists of three permanent judges appointed by the Secretary of Labor, one of whom is designated as Chief Judge and Chairman of ECAB. ECAB also has a Clerk of the Board who assigns appeal requests and places the case on a docket by number. It is the Clerk's Office that communicates directly with OWCP on behalf of ECAB.
- ECAB may review questions of law, fact, and discretionary actions in FECA cases, except amounts payable for medical services, and exclusion and reinstatement of medical providers. Only evidence in case record at time of OWCP's final decision will be reviewed. ECAB cannot consider new evidence.

# ECAB

- Effective November 19, 2008, appellants must file application for review by ECAB within 180 days from date of decision.
- ECAB may waive a failure to file an application within 180 days. ECAB maintains discretion to extend time period for filing an appeal if an applicant demonstrates compelling circumstances. Compelling circumstances means circumstances beyond appellant's control that prevent timely filing of an appeal, and does not include any delay caused by failure of an individual to exercise due diligence in submitting a notice of appeal.

# ECAB



- It is important that claimant address any ECAB appeal requests in writing directly to ECAB.
- Once a case is accepted by ECAB for an appeal, that case file is assigned a docket number.
- After ECAB docketing an appeal, OWCP no longer has jurisdiction over claim with respect to issues directly relating to issue(s) on appeal.

# Questions

Appeal rights include a hearing, reconsideration, and/or review by the Employees' Compensation Appeals Board (ECAB). Applications for reconsideration are handled by:

- a) The Branch of Hearings and Review with OWCP.
- b) The Employees' Compensation Appeals Board.
- c) OWCP personnel.
- d) The claimant's agency.

# Questions

There is no limit to the number of times a claimant may request reconsideration and submit additional evidence.

- a) True
- b) False



# Questions

Oral Hearings held by the Branch of Hearings and Review are open to:

- a) Claimants and their representatives
- b) Witnesses
- c) Employing Agency officials
- d) All of the above

# Questions

When a claimant applies for reconsideration of a final decision, the request must include all of the following except:

- a) Be in writing
- b) Identify the number of times they have filed for reconsideration
- c) Identify the issues for reconsideration
- d) Be signed and dated
- e) Identify the decision they are appealing
- f) Be accompanied by relevant new evidence or argument not considered previously

# Questions

If it is decided that a reconsideration request warrants a merit review of the file, the assigned examiner will review the file and issue a decision. All of the following are types of decisions the assigned examiner might prepare except:

- a) A formal decision to modify any previous decision.
- b) A vacate order along with a cover letter.
- c) A formal decision to deny modification of a prior decision.
- d) A formal decision to send the case to the Branch of Hearings and Review for their opinion.

# Questions

A claimant must file an application for review by the Employees' Compensation Appeals Board within how many days of the date of the decision.

- a) 30 days
- b) 90 days
- c) 180 days
- d) 1 year

# Take Away Tips

- 1) All notices of decision and compensation orders are considered formal decisions on claims for monetary compensation, and may be appealed.
- 2) Appeal rights include a hearing, reconsideration, and/or review by the Employees' Compensation Appeals Board.
- 3) A claimant who is not satisfied with a formal decision is entitled to a hearing by a Branch of Hearings and Review representative if the request is made within 30 days of the date of the decision.
- 4) OWCP may review and reconsider an award for or against payment of compensation at any time on the District Director's own motion or on application from claimant, and may: end, decrease, or increase the compensation previously awarded; or award compensation previously refused or discontinued.

# Take Away Tips

- 5) Reconsiderations must be received within one calendar year from the date of the original decision. Right to reconsideration within one year also applies to any subsequent merit decision on issue(s), such as hearings, written reviews, and ECAB merit decisions.
- 6) ECAB is an independent Department of Labor agency which considers and decides appeals of formal decisions in FECA cases. ECAB may review questions of law, fact, and discretionary actions in FECA cases, except amounts payable for medical services, and exclusion and reinstatement of medical providers. Only evidence in case record at time of OWCP's final decision will be reviewed. ECAB cannot consider new evidence.
- 7) Once a case is accepted by ECAB for an appeal, that case file is assigned a docket number. After ECAB docketing an appeal, OWCP no longer has jurisdiction over the claim with respect to issues directly relating to issue(s) on appeal.